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No. 96 553

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK et ano.,

Petitioners,,

- against -

BETTY LOUISE FELTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

Whether the Court should reconsider its holding in Aguilar v. Felton, 473 U.S. 402 (1985) that municipal petitioners may not, consistent with the Establishment Clause of the First Amendment, provide federally-funded remedial and educational services through petitioners' professional employees to eligible students on the site of parochial schools which such students attend ?

PARTIES TO THE PROCEEDING

Petitioners are the Chancellor of the Board of Education of the City of New York and the Board of Education of the City School District of the City of New York. They were defendants-appellants in the Court of Appeals. Betty Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side and Allen H. Zelon are respondents and were plaintiffs-cross-appellants in the Court of Appeals.

The Secretary of Education is a respondent and was a defendant-appellee in the Court of Appeals. Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnation, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueora, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens, and

Rosemarie Vasquez, respondents on the petition, were intervenors-defendants-appellants in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Chancellor of the Board of Education and Board of Education of the City of New York respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered on August 30, 1996. We are informed that the Defendants-Intervenors are also petitioning for certiorari from the same decision.

OPINIONS BELOW

The order of the Court of Appeals, which under its rules will not be reported in the Federal Reporter, is reprinted in the Appendix to the Petition ("App.") at pp. A2-A5. The decision of the United States District Court for the Eastern District of New York, which is unreported, is contained in the Appendix at pp. A6-A21.

This Court's prior opinion in this case, Aguilar v. Felton, is reported at 473 U.S. 402.

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 1996. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant Provisions of Title I of the Improving American Schools Act of 1994

20 U.S.C. § 6321, Participation of children enrolled in Private Schools

(a) General Requirement

(1) In general

To the extent consistent with the number of eligible children identified under section 6315(b) of this title in a local educational agency who are enrolled in private elementary and secondary schools, a local educational agency shall, after timely and meaningful consultation with appropriate private school officials, provide such children, on an equitable basis, special educational services or other benefits under this part (such as dual enrollment, educational radio and television, computer equipment and materials, other technology, and mobile educational services and equipment).

(2) Secular, neutral, nonideological

Such educational services or other benefits, including materials and equipment, shall be secular, neutral, and nonideological.

(3) Equity

Educational services and other benefits for such private school children shall be equitable in comparison to services and other benefits for public school children participating under this part.

(4) Expenditures

Expenditures for educational services and other benefits to eligible private school children shall be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from low-income families who attend private schools.

(5) Provision of services

The local educational agency may provide such services directly or through contracts with public and private agencies, organizations, and institutions.

(b) Consultation

(1) In General

To ensure timely and meaningful consultation, a local educational agency shall consult with appropriate private school officials during the design and development of such agency's programs under this part, on issues such as --

(A) how the children's needs will be identified;

(B) What services will be offered;

(C) how and where the services will be provided;

(D) how the services will be assessed; and

(E) the size and scope of the equitable services to be provided to the eligible private school children, and what is the proportion of funds allocated under subsection (a)(4) of this section for such services.

* * *

(c) Public control of funds

(1) In general

The control of funds provided under this part, and title to materials, equipment, and property purchased with such funds, shall be in a public agency, and a public agency shall administer such funds and property.

* * *

20 U.S.C., § 6322 Fiscal Requirements

* * *

(b) Federal funds to supplement, not supplant, non-Federal funds

(1) In general

(A) Except as provided in subparagraph (B), a State or local educational agency shall use funds received under this part only to supplement the amount of

funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.

(B) For the purpose of complying with subparagraph (A), a State or local educational agency may exclude supplemental State and local funds expended, in any eligible school attendance area or school for programs that meet the requirements of section 6314 or 6315 of this title.

* * *

STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief and subject matter jurisdiction is invoked under 28 USC § 1331 because the action arises under the United States Constitution and federal law. In Aguilar v. Felton, 473 U.S. 402 (1985), this Court, by a 5-4 majority, held the City's method of expending federal Title I funds on needy students in parochial schools violated the Establishment Clause because Board of Education teachers and other

professionals provided their remedial and related educational services on the premises of parochial schools. The program involved in that case, originally enacted as Title I of the Elementary and Secondary Education Act of 1965, and later superseded by Chapter 1 of the Education Consolidation Act of 1981, authorized the Secretary of Education to distribute financial assistance, through the states, to local educational institutions to meet the needs of educationally deprived children from low-income families.

Pursuant to Title I, federal funds were provided for remedial, supplementary education and support services for elementary and secondary school students. App., p. A32. Although the statutory scheme considered in Aguilar has been superseded by subsequent legislation, most recently by Title I[1] of the Improving America's Schools Act of 1994,

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[1] For purposes of clarity, all references to the statutory (continued...)

codified at 20 U.S.C. § 6301 et seq, the provisions relating to private school students have remained essentially unchanged. Title I benefits are available to all eligible students including those who attend parochial schools. 20 U.S.C. § 6321. Title I funds can be used only to supplement, not to supplant, the public or private school student's regular classroom work. See 20 U.S.C. § 6322(b). Title I services provided to private school students must be "equitable" in comparison to services provided to participating public school students. 20 U.S.C. § 6321(a)(3), (d): 60 Fed. Reg. 34800, 34807-08 (July 3, 1995) (to be codified at 34 C.F.R. 200.10-11). All services and materials provided with Title I funding must be secular, neutral and nonideological, and the control of all funds and

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[1] (...continued)
schemes in effect at various times will be by the term "Title I."

title to all equipment provided under Title I must be in a public agency. 20 U.S.C. § 6321(a)(2) & (c)(1).

Beginning in 1966, the City's Board of Education provided Title I services on premises to students at private schools, during the school day. App., p. A39. This was done only after attempts to provide the services by alternative means, including providing the services after the school day, proved unsuccessful. Aguilar, 473 U.S. at p. 423; App., pp. A37-39. Under its on-site program, the administrators of the parochial schools were required to clear the classrooms used by the public school professionals of all religious symbols. All materials and equipment funded by Title I were used only for the program's purposes. Aguilar, p. 407. Most of the teachers were of a different faith than the students they taught and there was no evidence that any teacher had ever tried to inculcate religious beliefs. Ibid., p. 431. The on-site program was

very successful, and participating private school students showed measurable improvement in overcoming their educational achievement deficits. App., pp. A39-40.

Despite the contours of Title I and the Board's program, and the efforts of the Board's teachers which Justice O'Connor described as "praiseworthy," (Aguilar, p. 431), the Court, applying the Lemon test (Lemon v. Kurtzman, 403 U.S. 602 [1971]), invalidated the City's program because of excessive Church and State entanglement. 473 U.S. at 409-414.

After issuance of this Court's opinion in September 1985, a judgment was entered in the United States District Court for the Eastern District of New York, containing an injunction prohibiting the Secretary of the Department of Education and the Chancellor of the Board of Education of the City of New York from using public funds for any Title I program to the extent it authorizes public school teachers

and counsellors to provide professional services on the premises of sectarian schools in New York City. App., pp. A22, A25-26. As a result the Chancellor and the Board have sought to provide the Title I services through alternative means, which have proven to be both less effective and more expensive than the on-site program which existed for 20 years prior to Aguilar.

The Board has used four alternative methods of providing Title I services to private school children, which in the 1984-85 school year included approximately 22,000 students, the great majority being parochial school students. App., pp. A41, A43-44. After Aguilar there was a drop-off in private school participation, but by 1993-94, the number again approached 22,000, out of a total New York City Title I population, in both public and private schools of approximately 260,000. App., pp. A35, A80.

The alternatives are public school sites, leased sites, Mobile Instruction Units ("MIU's"), and Computer Assisted Instruction ("CAI"). Because of severe overcrowding at the Board's public schools as a result of a growing public school population, as well as problems caused by travel between the private and public schools, the use of public school sites has decreased so that while in 1985/86 approximately 3500 private school students obtained Title I services at public school sites, by the 1993-94 school year, approximately 1200 students received services at public school sites. App., pp. A45-49. Furthermore, private school participation in Title I decreased sharply in the initial years after Aguilar, at least partly because of dissatisfaction with the public school sites. App., pp. A47-49, A133-135. The leased sites have been a limited resource for Title I services due to the unavailability of appropriate sites. App., pp. A59-62. In 1993-94,

approximately 1600 private school students received their Title I services on leased sites. App., pp. A61-62.

The remaining two alternatives, which the Chancellor has been forced to use, are Mobile Instruction Units and Computer Assisted Instruction. Both are unsatisfactory. An MIU is really an expensive bus turned into a classroom, while CAI is a depersonalized, electronic teacher. In 1986-87, approximately 3500 private school students were receiving their Title I services in MIU's; by 1993-94, approximately 11,600 students, or more than half of the private school students receiving Title I assistance, received them in MIU's. App., pp. A35, A58.

The MIUs are very expensive. The Board leases MIUs from a private company at an annual cost of $106,934 per vehicle. App., p. A87. The total cost for leasing MIUs through the first 8 years of the post-Aguilar program was $83,729,440. App., pp. A84, A99. In 1994-

95, the Board leased 126 MIU's. App., p. A58. The contract requires the MIU supplier to provide garage, maintenance, repair, cleaning, and insurance for the MIU. App., p. A54. The supplier must also provide a driver who remains at the MIU during the school day to provide security. App., p. A55.

In order to maximize the efficient use of MIUs, each vehicle contains a folding partition. When the partition is closed, one section of the MIU can accommodate a class of up to 10 students, which is the maximum class size with one teacher permitted under the New York State Education Department ("SED") Guidelines. The smaller section can be used for activities such as counseling, "English as a Second Language" classes, parent-teacher conferences, or staff conferences. App., pp. A53-54.

MIUs lack many of the amenities which are accessible in the traditional school environment. First,

MIUs lack telephone services. Each vehicle is equipped with a walkie-talkie, which is used in case of an emergency. Second, MIUs lack bathroom facilities. Third, due to safety considerations, windows in the MIU classroom area are small and covered with a heavy wire grid. Fourth, there is limited storage space for equipment and supplies. Fifth, MIUs lack an external source of electrical power. App., pp. A55-57.

During school hours, the MIU is parked on a public street near the private school. MIUs are not permitted to be parked on private school property. Instead, they are generally parked on the same block as or around the corner from the private school. App., p. 57. These children are thus forced to leave the school and go to the bus, highlighting that they are in need. This is demeaning.

The Board's final alternative means of supplying Title I services to the private school students is Computer-

assisted instruction, or "CAI." CAI provides private school students with Title I instruction via computers that are linked by modems or by dedicated telephone lines to a Board office. By 1994, 9,662 private school students were served by CAI; of those, 2,115 students received CAI services in conjunction with face-to-face services provided at either public school sites, leased sites or MIU's; this combination service was provided in response to Title I achievement tests which showed that students who receive their Title I services only by CAI do not as a group make as much educational progress as students who have the benefit of personal instruction by teachers. App., pp. A62, A68-70.

The Board's Title I teachers are not present in the private school during CAI sessions. When students use the computers, their work product is transmitted electronically to a centralized Board office where Title I instructors

monitor the students' work, report on their progress, and adjust each student's curriculum as appropriate. App., pp. A62-63. The only Board employee who is present in the CAI room during Title I sessions is a CAI computer technician. App., p. A63.

Compliance with Aguilar has been very expensive. For the school years 1986-87 through 1993-94, the Board spent $93,245,424 for the additional costs of complying with Aguilar. App., pp. A77, A97. $83,729,440 of that amount was spent in leasing MIU's. App., pp. A84, A99. Under regulations promulgated by the Secretary of Education, the non-instructional administrative costs of complying with Aguilar must be taken "off the top" of the Local Educational Agency or LEA's total allocation of Title I funds. App., pp. A81-82, A157-158; See 60 Fed. Reg. at 34810 (to be codified at 34 C.F.R. 200.27(c)). Thus such costs of complying with Aguilar reduce the amount of

Title I funds available for both public and private school students. Both the State of New York and Congress, in response to Aguilar, made funds available for such Aguilar-related capital expenses. App., pp. A78-79, A97. Furthermore, certain "carryover funds" were available from prior years because of the decrease of participation by private school students in New York City after Aguilar, App., p. A80, but state funds were eliminated in 1991, and the "carry-over" funds were almost exhausted at the time this motion was made. App., pp. A82-84. For example, in 1995/96, the Board budgeted approximately 16 million dollars for such capital expenses of complying with Aguilar and was required to use almost 6 million dollars "off-the-top" of its Title I allocation for such expenses. App., p. A159.

The post-Aguilar means of providing Title I services to private school students are less educationally effective

than the on-site program. The use of MIU's, leased sites and public school sites involves the loss of instructional time because of the movement of students out of the private schools. The bus in itself is an inadequate school location. App., pp. A71-72. Necessary coordination between the Title I teacher and the private school staff is made more difficult. App., pp. A73-76. As discussed above, CAI is not as educationally effective as personal instruction by a teacher. App., p. A69.

Compliance with Aguilar is a nationwide problem. In October, 1995, the Secretary of Education issued a statement in which he pointed out that hundreds of million of dollars had been spent by school districts to comply with Aguilar, and described Aguilar as having a "significant negative impact on Title I services for the neediest children in both public and private schools." App., p. A157, A159.

Secretary Riley called for reconsideration of Aguilar in an appropriate case. App., p. A157, A161.

On June 7, 1995, the Board of Education passed a resolution authorizing their counsel to commence legal proceedings to seek reconsideration of Aguilar. In its resolution, the Board noted both the great financial costs and the educational disadvantages of the present means of delivering Title I services to private school students. App., pp. A163-170. Thereafter, the Chancellor and the Board moved pursuant to Rule 60 (b) for relief from the District Court judgment.

DECISIONS BELOW

Although the District Court recognized that the Board's present program of delivering Title I services to parochial school students constituted an "indisputably enormous expense," the Court denied the motion because Aguilar has not been explicitly overruled. App., pp. A11,

A20. The Court, however, found that the Board and Chancellor had followed the proper procedure in moving under Rule 60(b), and that the motion should not be denied as untimely. App., pp. A14-20. Indeed, the Court noted that there "could scarcely be a more appropriate vehicle" for reconsideration of Aguilar than the same case in which the Board "is struggling with the consequences of ... [that] ... decision." App., p. A21.

On appeal, the Court of Appeals affirmed, substantially for the reasons stated by the District Court. App., pp. A2-4.

REASONS TO GRANT WRIT

In Aguilar, this Court, by a bare 5-4 majority, struck down a program described by then Chief Justice Burger as one that "has done so much good and little, if any, detectable harm." 473 U.S. at 420, quoting Felton v. Secretary, United States Department of Education, 739 F.2d

48, 72 (2d Cir., 1984). Indeed, as Justice O'Connor stated, in the 19 years of the Board's on-site program, there had never been an incident in which a Title I instructor had even subtly attempted to indoctrinate a student in any religious tenet. 473 U.S. at 424. It was also clear at that time that the alternative methods of providing the Title I services would be more expensive and less effective than the on-site program. Ibid.

In Board of Education of Kiryas Joel v. Grumet, __ U.S. __, 114 S.Ct. 2481 (1994), a case based on facts which are directly attributable to Aguilar, five members of the Court explicitly stated their wish to reconsider Aguilar. Ibid., p. 2498 (O'Connor, concurring); Ibid., p. 2505 (Kennedy, concurring); Ibid., p. 2515 (Scalia dissenting, joined by Rehnquist and Thomas). In light of the record established on our motion in the District Court, that judgment is correct and Aguilar should be reconsidered.

The post Aguilar history confirms what was foreseen at the time of the decision. The Department of Education, based on a study by the General Accounting Office, estimates that the nation's school districts have spent hundreds of millions of dollars in non-instructional costs in order to comply with Aguilar. App., p. A159. In times of ever-scarcer governmental resources, such funds were not used to improve the educational services needed by these children, but for the abstract and dubious benefit of making these students leave their schools to receive services at supposedly "neutral" sites. This method of providing the remedial services provides no tangible benefit to the students, and is a less educationally effective means of providing the services. App., pp. A70-77, A160-161.

Aguilar has also led to constitutional difficulties. In Kiryas Joel, supra, New York State set up a separate school district for a Hasidic Jewish community, in an attempt to

accommodate the unique religious beliefs of that sect in the face of the constraints of Aguilar. This Court struck down the school district as a violation of the Establishment Clause, and Justices O'Connor and Kennedy, who called for the reconsideration of Aguilar, concurred in that determination. Ibid., pp. 2495-2500 (O'Connor, J.) and 2500-2505. (Kennedy, J.).

Since Aguilar, this Court has taken a more realistic and less doctrinaire and accommodating approach to a claimed Establishment Clause violation in the area of educational assistance. In Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993), the Court held that the Establishment Clause was not violated by providing a publicly-employed sign language interpreter to a deaf student attending a Catholic high school. Not only would the state-employed interpreter be in the religious school throughout the regular school day, but he or she would be

required to communicate verbatim the material covered in religion class, daily Mass, and the "nominally secular subjects that are taught from a religious perspective." 509 U.S. at 19 (Blackmun, J., dissenting). The Court found no Establishment Clause violation because the service was provided pursuant to a general government program (the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq, and an Arizona statute) that distributed benefits on a neutral basis to all qualifying children; the presence of the interpreter on the sectarian school premises was the result of parental, not governmental, choice, thus providing no financial incentive to use the sectarian school; and no government funds reached sectarian coffers. 509 U.S. at pp. 10-11. We believe that under this analysis, the Board's on-site program, struck down in Aguilar, would pass constitutional muster. While the Court did point out that a sign-language interpreter is different from a teacher

or counsellor, 509 U.S. at 13, this factor was not part of its core legal analysis; in light of the history of the Board's program, such distinction does not constitute a basis for denying remedial education to needy students.

Similarly, in Rosenberger v. Rector and Visitors of the University of Virginia, __ U.S. __, 115 S.Ct. 2510, 2521 (1995), the Court emphasized that "a central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." The ruling in Aguilar gave no weight to this "significant factor," although faced with a national program aimed at assisting needy children regardless of the religious or secular nature of the school they attend.

Compliance with Aguilar has created substantial economic, educational, and constitutional difficulties and is thus ripe for reconsideration. It is submitted that this case

is the best vehicle for such reconsideration. It would put before the Court the history of a program which, for almost twenty years prior to Aguilar, served students on the premises of secular schools without any discernable religious effect, and for about ten years encountered the difficulties of complying with that decision. Indeed, on our Rule 60(b) motion, we submitted a copy of the Joint Appendix submitted on the argument of Aguilar. As the largest Title I program in the nation, with a great number of both public and private school students eligible for Title I assistance, the petitioners' program presents a paradigm of the unfortunate effects of Aguilar.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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October 4, 1996

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